INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	7
Conclusion	13

CITATIONS

Cases:

Abel v. *United States*, 362 U.S. 217	7, 9, 10
Alderman v. *United States*, No. 133, O.T., 1967, decided March 10, 1969	12
Boyd v. *United States*, 116 U.S. 616	7
Hoffa v. *United States*, 385 U.S. 293	12
Lopez v. *United States*, 373 U.S. 427	12
On Lee v. *United States*, 343 U.S. 747	12
United States v. *Blue*, 384 U.S. 251	9, 10
United States v. *Detroit Vital Foods, Inc.*, 330 F. 2d 78, certiorari denied, 379 U.S. 832	4
United States v. *Light*, 394 F. 2d 908	9, 10
United States v. *Parrott*, S.D.N.Y., No. 66 Cr. 243, decided February 14, 1969	9, 10

Constitution, statutes and rules:

U.S. Constitution:	
Fourth Amendment	2, 7, 10, 11, 12
Fifth Amendment	7, 8
21 U.S.C. 331(a)(k)	2
21 U.S.C. 334	4
21 U.S.C. 335	5
21 U.S.C. 352(f)	4
28 U.S.C. 1918	3
Rule 30(b), F.R. Civ. P.	9
Rule 33, F.R. Civ. P.	2, 4

350-922—69

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1285

DETROIT VITAL FOODS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 29a–39a) is reported at 407 F. 2d 570.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1968, and was modified on a petition for rehearing on February 20, 1969. On March 20, 1969, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to April 21, 1969, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for violation of the food and drug laws, petitioner's rights under the Fourth Amendment were violated by the fact that the government, in a prior civil proceeding to condemn the drugs owned by the petitioner corporation, had directed interrogatories to the corporation pursuant to Rule 33, F.R. Civ. P., with respect to the activities of the corporation and certain of its officers in connection with the drugs.

2. Whether the indictment should have been quashed because it was based in part on information obtained through the use of the interrogatories.

3. Whether tape recordings of public lectures given by an officer of petitioner corporation were properly admitted into evidence.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner and two of its officers (Kordel and Feldten) were convicted on five counts of an indictment charging them with introducing into interstate commerce certain misbranded drugs (Frutex wafers, Lecigan granules, Aminex and Nutri-Time tablets) and with performing acts which resulted in the misbranding of the drug Korleen while it was being held for sale after shipment in interstate commerce (21 U.S.C. 331 (a), (k)). Petitioner was sentenced to pay a fine of

$1000 on each count, plus the costs of prosecution pursuant to 28 U.S.C. 1916 (707a).[1]

Petitioner is a Michigan corporation with its headquarters in Detroit. Kordel was its president and Feldten its treasurer (250b–252b). Kordel was the author of numerous books and leaflets promoting the products of petitioner. As the court of appeals found, the evidence showed that during the years 1959–1961 Kordel traveled across the country delivering lectures in various cities which were advertised and open to the public. The books and lectures were discussions of how various physical ailments could be alleviated by the intake of certain foods and food elements. The best source of these foods and food elements, it was said, were the products of petitioner offered for sale by the defendants. The company's products were sold at booths established in or near the lecture halls and were also available in health food stores generally. Feldten made no speeches but acted as Kordel's assistant (Pet. 29a–30a). The essence of the criminal charges against the defendants was that, as to some of the products, certain books and leaflets written by Kordel constituted part of the labeling and contained

[1] Page references followed by "a" are to defendants' appendix in the court of appeals; those followed by "b" are to the government's appendix in that court. Both appendices, which contain substantial excerpts from the proceedings in the district court, are on file with the Clerk of this Court in connection with the government's petition for a writ of certiorari in No. 1291, this Term. See *infra*, p. 7.

false and misleading statements. In addition, the indictment alleged, as to all counts on which the defendants were convicted,[2] that the products (claimed by defendants to be merely food supplements) were in fact drugs intended by defendants to be used for the treatment of various diseases and conditions (see Pet. 30a–31a) and that the labeling for them was deficient under 21 U.S.C. 352(f) in that it failed to set forth adequate directions for use (*e.g.*, the dosage, frequency and duration of administration of each drug). The government proved Kordel's oral representations about the drugs by introducing tape recordings of his public lectures, each of which was attended by at least one agent of the Food and Drug Administration.

The indictment in this case was returned in July 1963. On June 9, 1960, the government had filed a libel under 21 U.S.C. 334 seeking to condemn quantities of the products Korleen tablets and Frutex, on the ground that they had been misbranded while held for sale after shipment in interstate commerce. Petitioner filed a claim and answer denying the material allegations of the libel. During the course of the civil suit, which terminated favorably to the government (see *United States* v. *Detroit Vital Foods, Inc.*, 330 F. 2d 78 (C.A. 6), certiorari denied, 379 U.S. 832), the government served interrogatories upon the claimant pursuant to Rule 33, F.R. Civ. P. The interrogatories were filed on January 9, 1961, and sought detailed in-

[2] Defendants were convicted on counts 4, 8, 9, 10, and 11 of the indictment, which are set forth at pages 13a–17a and 26a–39a of defendants' appendix.

formation about petitioner and about Kordel's oral representations concerning the products Frutex and Korleen tablets made during the lecture series at Detroit between March 29, and April 8, 1960.[3] In April 1961 petitioner moved to stay the libel action on the ground that criminal prosecution was being considered by the government. The motion recited that in late January 1961, shortly after service of the interrogatories by the government, the company had received a notice under 21 U.S.C. 335, indicating that criminal prosecution of the corporation and of Kordel and Feldten was contemplated, in part for the same conduct which was the subject of the libel. The motion asked that the claimant's time to respond to the interrogatories be extended until after final disposition of the criminal case pursuant to the court's discretionary power, since answering the interrogatories would disclose the basis of the claimant's defense in the criminal case. In June 1961, the district court denied the motion for a stay, on the ground that there was no certainty when or whether a criminal prosecution would be brought, and that the corporation was not prejudiced by being required to answer the interrogatories, since the government could in any event obtain information pertinent to a criminal case from the trial of the libel itself.[4] Answers to the interrogatories were

[3] Count 4 of the instant indictment was based on this lecture-promotion. The other counts on which petitioner was convicted were based on lecture-promotions of March 7–17, 1960, given at New York, and April 4–14, 1961, given at Detroit.

[4] We have lodged with the Clerk of this Court, in connection with our petition for certiorari in No. 1291, this Term, a copy of the district court's decision denying claimant's motion to stay the libel proceeding.

subsequently filed by Feldten, on behalf of petitioner.

Following receipt of petitioner's answers to the interrogatories, the matter was referred to the Attorney General with a recommendation for prosecution on June 13, 1962. An indictment was returned on August 5, 1963. On March 22, 1965, defendants moved to suppress "any evidence or leads obtained therefrom by the Federal Government in compulsory discovery proceedings instituted by the Government" in the libel action (55a). They contended that the use of such evidence and leads constituted "an unconstitutional exercise of inquisitorial authority, and is violative of civilized standards of procedures in the administration of criminal justice" (*ibid.*). In the alternative the motion requested a hearing to determine the government's good faith and motive in commencing the civil action and serving the interrogatories. The district court granted the request for a hearing. After a three-day hearing (see 1b–66b), the court found (in an opinion set forth at Pet. App. 8a–11a) that at the time the civil case was filed, the attorney for the Food and Drug Administration had evidence to establish all of the elements of the criminal offenses (see testimony of George Fowler, Deputy Director of the Detroit District of the F.D.A., at 6b–7b, 14b), and that the purpose of the interrogatories was to narrow the issues and to lay a foundation for a motion for summary judgment. The court determined that the government did not act in bad faith in starting the civil suit or in filing the interrogatories,

and that there was then no certainty that a criminal prosecution would be brought. The motion to suppress was, therefore, denied, on the authority of *Abel* v. *United States,* 362 U.S. 217, 225–230.

On July 26, 1968, the court of appeals reversed the convictions of all defendants on the ground that they had been denied the protection afforded by the Fifth Amendment in connection with the use of the interrogatories (Pet. 18a–27a).[5] The government filed a petition for rehearing which was granted. On February 20, 1969, the court of appeals, noting that the Fifth Amendment privilege against self-incrimination was not available to the corporation, modified its written opinion so as to affirm the conviction of petitioner, but adhered to its judgment reversing the convictions of Kordel and Feldten (Pet. 28a–39a). The government has filed a petition for a writ of certiorari from the judgment reversing the convictions of the individual defendants. No. 1291, this Term, presently pending.

ARGUMENT

1. Petitioner's contention that its Fourth Amendment rights were infringed by the government's use of the interrogatories in the libel suit would seem to hinge on the question whether, assuming service of the interrogatories constituted a search and seizure (see *Boyd* v. *United States,* 116 U.S. 616), the government's use of the interrogatories was "reasonable"

[5] The court stated in that opinion that it found "no merit in the other grounds assigned as error by the defendants" (Pet. 27a), which include the matters relied on by petitioner in questions 2–4 of the petition, discussed in parts 2 and 3 of the Argument herein.

within the meaning of the Amendment. This question is substantially different from the issue presented in the government's petition for certiorari in No. 1291 concerning the court of appeals' holding that the Fifth Amendment privilege against self-incrimination of the individual defendants in this case was violated by the government's service of the interrogatories on the corporation under a theory that this "compelled" them to furnish incriminating information. If in fact there was compulsion on the individual defendants to answer the interrogatories (which we dispute), then the government's good faith or reasonableness in serving the interrogatories would be irrelevant, as the court below held. Since, therefore, the issue which petitioner raises is discrete from that raised in the government's petition, the granting of the government's petition would not necessitate consideration of the question raised here.

On its own merits, there is no reason to review this case on behalf of petitioner corporation. Petitioner's contention that the use of the interrogatories in this case was unreasonable ignores the findings of the district judge on the motion to suppress (Pet. 8a–11a), which have ample support in the record (see 1b–66b). It simply is not the fact, as petitioner would have it, that the civil proceeding was instituted, or the interrogatories served, in bad faith as a means of obtaining information for use in the criminal prosecution. On the contrary, the record shows, as the court found, that the purpose of the interrogatories was the normal one of attempting to expedite the civil action by preparing a foundation for a motion for summary

judgment. At the time the civil action was commenced and the interrogatories submitted, there was no certainty that a criminal action would even be begun.

Moreover, it is not improper for a government agency to proceed simultaneously on criminal and civil fronts against a corporation or individuals. See *United States* v. *Blue,* 384 U.S. 251; *Abel* v. *United States,* 362 U.S. 217; *United States* v. *Light,* 394 F. 2d 908 (C.A. 2); *United States* v. *Parrott,* S.D.N.Y., No. 66 Cr. 243, decided February 14, 1969. Government agencies in many fields, including food and drug, securities, antitrust and tax, among others, are vested with the responsibility of administering federal statutes which provide both civil and criminal remedies against offending corporations and/or persons. In administering the food and drug laws, there is an obvious need for the government to act quickly in bringing civil condemnation proceedings to protect the public by removing misbranded or adulterated drugs from circulation in the common situation in which further investigation is appropriate before it is decided whether or not to institute a criminal prosecution. That is what was done here. The courts below properly determined that since the action of the government in bringing the civil suit was reasonable, and since its use of the interrogatories was designed to advance the purpose of the civil litigation and was authorized by the Federal Rules of Civil Procedure for that purpose,[6] no rights

[6] Rules 30(b) and 33, F.R. Civ. P., provide the means by which a party may be excused, in the civil proceeding itself, from answering improper or overbroad interrogatories. One who fails to pursue this remedy and chooses, instead, to an-

of petitioner under the Fourth Amendment were transgressed. See *Abel* v. *United States, supra; United States* v. *Light, supra; United States* v. *Parrott, supra.*

2. Petitioner's argument that the indictment should have been quashed because it was founded on information derived from the allegedly unlawful use of the interrogatories is baseless. As we have pointed out above, the serving of the interrogatories was not unlawful. In any event, use of the information obtained thereby did not invalidate the indictment. *United States* v. *Blue,* 384 U.S. 251.[7]

Petitioner also contends (Pet. 15–16) that there was no competent witness before the grand jury because the sole person who appeared before that body was the government agent (Fowler) who was in charge of the agency investigation in connection with the present case. As the trial judge correctly ruled (Pet. 16a), however, the agent-in-charge was a competent witness and was not, as petitioner asserts (Pet. 16), a "prose-

---

swer the interrogatories should not be heard to claim, in a subsequent proceeding, that the interrogatories violated his Fourth Amendment rights.

[7] While perhaps legally irrelevant, we note that petitioners' assertion that agent Fowler's "testimony [before the grand jury] consisted merely of the answers to the interrogatories" (Pet. 16) is inaccurate. Agent Fowler testified that he did not read from the case file during the course of his testimony, but reviewed the file in preparing for his testimony (43b). The agency file, which did not even contain all of petitioner's answers to the interrogatories (45b–47b), consisted of data which had been gathered by the F.D.A. in connection with both the civil and criminal proceeding (44b). Much of that information had been obtained long prior to the service of, and answers to, the interrogatories here complained of (6b–7b, 14b).

cutor". The circumstance that agent Fowler supplied the grand jury with a proposed indictment in this complicated case (46b, 49b–50b) does not impair the validity of the indictment or the agent's status as a witness.

3. At trial, defendants objected to the admissibility of recordings and transcripts of Kordel's lectures given at Detroit in 1960 and 1961, on which counts 4 and 11 of the instant indictment were based. The ground of the objections was that the tapes were obtained in violation of the Fourth Amendment by the illegal use of electronic equipment. The district judge at trial denied the motion to suppress the tapes and repeated his ruling in denying a post-verdict motion for acquittal or a new trial (Pet. 16a–17a).

The first two lectures of the 1960 series (March 29–April 8) were given in the Masonic Temple; the remainder took place at the Fort Wayne Hotel. The recording of the 1960 Masonic Temple lecture was accomplished by Food and Drug Inspectors Covert and Beebe who, prior to the lecture, obtained the permission of the building manager to tape it with a recorder already installed in the manager's office, which was connected to the speaker's microphone in the lecture hall (125b–127b, 225a–230a). The remaining lectures were transcribed after the same two agents, prior to the giving of the third lecture, obtained the permission of the Fort Wayne Hotel manager to install recording equipment. They placed a recorder in a room of the hotel and ran a wire and microphone across the roof of the lecture hall and

down an air vent into the ceiling of the lecture hall, which was leased to Kordel (142b–144b, 255a–260a).

The lecture at the Temple in 1961 was recorded by means of a Minifon recorder carried into the lecture hall by Food and Drug Inspector Vince (181b–183b). The lectures at the hotel were recorded in the same manner as the 1960 lectures held therein (180b–181b, 265a–270a).

Petitioner's contention that the agents' action in recording the lectures violated its Fourth Amendment rights is without substance. The lectures given by Kordel were on all occasions open to the public. Wholly aside from any problems of standing (see *Alderman* v. *United States,* No. 133, O.T., 1967, decided March 10, 1969), it is clear that there was no intent on the part of the speaker or of petitioner corporation that Kordel's words be kept private. Thus, as the district judge held (Pet. 17a), the essential predicate for a Fourth Amendment violation was absent. See *Lopez* v. *United States,* 373 U.S. 427; *On Lee* v. *United States,* 343 U.S. 747; *Hoffa* v. *United States,* 385 U.S. 293.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

MAY 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969